

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 231 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO
-

KESHAVRAM MULCHANDAS

Versus

CHHOTALAL JAGJIVANDAS

Appearance:

MR MITUL SHELAT FOR MR SN SHELAT for Appellant
MR NAGIN N GANDHI for Respondent No. 1

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 22/06/2000

ORAL JUDGEMENT

1. This Second Appeal against the judgment and decree dated January 30, 1982 recorded in Regular Civil Appeal No. 84 of 1981 by the learned Assistant Judge, Surat, at the instance of the defendant was admitted for hearing on the following substantial questions of law:

"(1) Whether on facts and circumstances of the case and total measurement of respondent's land mentioned in Sanad Ex.57, 199 sq.yds. and 30 - 6' north and 26 - 6' south of S. No. 514 would include the entire gali land so as to make the respondent owner of the whole gali land?

(2) If not whether the respondent was entitled to the injunction prayed for?"

2. The appellant is the original defendant whereas the respondent is the original plaintiff. They are, therefore, hereinafter referred to in this judgment as 'the plaintiff' and 'the defendant' for the sake of convenience and brevity.

3. The facts leading to the present appeal are as under:

3.1. The plaintiff is the owner of the property bearing Nondh No. 514 situated in Ward No.2, Surat whereas the defendant is the owner of the property bearing Nondh No.513 situated in the same ward at Surat. As per the case of the plaintiff, in the year 1962 the defendant made construction on his land bearing S. No. 513. There is an open land to the east of S.No.514. The said open land, hereinafter referred to as the 'gully land', is semi-triangular in shape. The defendant has constructed his western wall abutting the said gully land. It was the case of the plaintiff that the defendant has no right to put up windows on the western wall of his property as the gully land is in possession of the plaintiff and the entrance of the said gully land is also in possession of the plaintiff. It was alleged that the defendant has put up four windows on the ground floor and four widows on the first floor on the western side of his property. It was the case of the plaintiff that the defendant has no right to put apertures, windows or doors on the western side wall of his property. It was also alleged that the defendant had agreed to close down the windows on the western wall of his property on the ground floor and on the first floor and for the purpose of executing a writing to that effect a stamp paper was also purchased but the defendant did not execute the said agreement and thereby the defendant refused to close down the windows and doors. The plaintiff, therefore, filed Regular Civil Suit No. 1480 of 1973 for a declaration that the gully land is of his

exclusive ownership and the defendant has no right or title over the gully land and the defendant has also no right to put up windows or doors on the western wall abutting the gully land. Consequential relief of permanent injunction was also prayed for restraining the defendant from putting any further windows on the second floor opening on the open land and from passing through the said gully land.

3.2. The defendant by filing written statement contested the suit of the plaintiff. He denied that the plaintiff is the exclusive owner of the gully land. However, he admitted that the gully land is to the east of the property bearing S.No.514 owned by the plaintiff. However, the defendant contended that he has put up four windows on the ground floor and four windows on the first floor of his property in the year 1956 and, therefore, the plaintiff cannot now be permitted to question his right as the plaintiff did not take any action when he put up windows on the western side wall of his property. He further contended that the gully land is of the joint ownership of the plaintiff and the defendant. He further contended that he has purchased properties bearing S. Nos. 512 and 513 by a registered sale deed dated August 22, 1952 and there was a superstructure on the property bearing S.No.513. He further contended that in the old superstructure there was a door abutting the gully land and he has replaced the old door with a new door. Lastly he contended that he is the owner of 1/2 of the gully land and he has a right to put up windows and doors on the western wall of his property. The defendant, therefore, prayed for the dismissal of the suit.

3.3. The learned trial Judge framed the issues and recorded evidence. After considering, appreciating and evaluating the evidence on record and after hearing the learned advocates for the parties, the learned trial Judge came to the conclusion that the plaintiff is the owner of the gully land situated on the eastern side of his property and the defendant has put up four widows on the ground floor and four widow on the first floor on western wall of his property abutting the gully land in the year 1962. The trial Court came to the conclusion that as the defendant has failed to prove that he is the joint owner of the gully land he has no right to put up any construction thereon and since the plaintiff is the exclusive owner of the gully land the defendant has no right to put up windows on the western wall of his property and to receive air and light therefrom nor entitled to put up any article in the said gully land and, therefore, the plaintiff is entitled to injunction

as prayed for. Therefore, the trial court has passed the decree as prayed for.

3.4. Aggrieved by the aforesaid decree, the defendant filed Regular Civil Appeal No. 84 of 1981 before the District Court of Surat. The learned Assistant Judge, Surat, on reappreciation and reevaluation of the evidence and considering the submissions advanced at the bar by the learned advocates appearing for the parties, affirmed the judgment and decree passed by the learned trial Judge by dismissing the appeal. It is this judgment and decree whereby the concurrent finding of fact has been recorded by both the courts below which is now under challenge in this Second Appeal at the instance of the defendant on the substantial questions of law to which reference has been made in earlier paragraphs of this judgment.

4. Heard Mr. Mitul Shelat for the appellant and Mr. Nagin Gandhi for the respondent.

5. The only contention advanced by Mr. Mitul Shelat for the appellant/defendant is that both the courts below have accepted the Sanad Ex.57 and on the basis of the said Sanad the plaintiff has claimed title over the entire gully land but if the measurement of the area mentioned in Ex.57 is considered, it is clear that the plaintiff is not the owner of the entire gully land. The description of the property and the measurement given in the Sanad indicate that the plaintiff is not the owner of the gully land. He further contended that there is no other document to prove that the plaintiff is the owner of the gully land. Therefore, according to him, both the courts below have erred in holding that the plaintiff is the owner of the gully land and resultantly, an erroneous finding of fact has been recorded by both the courts below which is liable to be quashed and set aside by this Court in exercise of powers conferred under section 100 of the Civil Procedure Code. It is stressed that whatsoever may be the concurrent finding of fact arrived at by the courts below, if it is reached on an erroneous interpretation of a document, it would result into miscarriage of justice which can be assailed in Second Appeal. On the aforesaid premises he assailed the judgment and decree passed by the lower appellate court by which it confirmed the judgment and decree passed by the trial court and submitted that the said decree is liable to be quashed and set aside by allowing the Second Appeal and thereby dismissing the suit filed by the plaintiff.

6. In counter submission, Mr. N.N. Gandhi for the

respondent/plaintiff contended that the substantial questions of law formulated by this Court in this Second Appeal, in real sense, can never be said to be substantial questions of law. Both the courts below have interpreted document Ex.57, i.e., Sanad and on the basis of the said document and oral evidence, came to the conclusion that the plaintiff is the owner of the gully land and, therefore, the defendant has no right to put up windows and doors on the western side of his wall so as to claim right on the gully land. Therefore, he submitted that the concurrent finding of fact recorded by both the courts below on the true and correct interpretation of the document Ex.57 coupled with the evidence of the Court Commissioner's report Ex.112 and sketch-map Ex.59, cannot be assailed in this Second Appeal. He, therefore, prayed for dismissal of the appeal by affirming the judgment and decree passed by the lower appellate court.

7. The case of the plaintiff was that the defendant has no right over the gully land which is towards the east of his property. It was also the case of the plaintiff that the defendant has constructed the western wall of his property bearing S.No. 513 in the year 1962 and at that time the defendant has put up four windows on the ground floor as well as four windows on the first floor and by opening those windows the defendant has tried to create his right of easement over the gully land belonging to the plaintiff. So far as the gully land is concerned, it is an admitted fact that it is of semi triangular shape. Its measurement is 5'.5" on the northern side and 2'.10" on the southern side. According to the plaintiff, he is the exclusive owner of the entire gully land and the gully land is a part and parcel of property bearing S.No. 514 belonging to him. To prove that the plaintiff is the owner of the gully land, he has examined himself at Ex.56, Jayantilal Amratlal at Ex.86 and Shantilal Maganlal at Ex.90. The plaintiff in his deposition has testified that said gully land is of his exclusive ownership and for that purpose reliance is placed at Ex.57 which is the Sanad issued in the year 1943. The plaintiff has also relied upon Sketch-map Ex.59 issued by the City Survey Department of the Government. He has further testified that the defendant had agreed to execute a writing to the effect that he would close the said windows on the western wall of his property and for that purpose the defendant had purchased a blank stamp paper of Rs.5/- on October 1, 1962. The said stamp paper is produced at Ex.58. It may be appreciated that the defendant in his written statement has admitted the factum of purchase of the said stamp

paper. On careful examination of Sanad Ex.57 it is seen that it was issued to the plaintiff in the year 1943. The property bearing S.No.514 was originally belonged to the Government and it was leased to the plaintiff for a period of 99 years in the year 1943. Thereafter the plaintiff agreed to purchase the said leasehold land from the Government and the Government by passing a resolution sold the land admeasuring 199 sq.yds., to the plaintiff. The order dated November 20, 1970 issued by the Collector is also produced on record by the plaintiff. From the documents produced on record there is no manner of doubt that the plaintiff has purchased land admeasuring 199 sq.yds., from the Government in the year 1970. So far as the Sketch-Map Ex.59 issued by the City Survey Department is concerned, the total area of S.No. 514 is shown to be 199 sq.yds. It is true that so far as Sanad Ex.57 is concerned, it was issued on December 17, 1943 to the plaintiff wherein the approximate measurement of the area by width and length is mentioned and the same does not tally with the measurement of 199 sq.yd. However, from the evidence on record, i.e., resolution passed by the Government and the order of the Collector dated November 20, 1970 it is established that the area of the property is 199 sq.yds.

8. So far as the oral evidence is concerned, it amply corroborates the documentary evidence discussed hereinabove and it is proved that the entire gully land belongs to the plaintiff.

9. In view of the discussion made in foregoing paragraphs, I am of the opinion that the plaintiff has proved that the semi triangular shaped gully land admeasuring 5'.5" on the northern side and 2'.10" on the southern side is of the exclusive ownership of the plaintiff and he has proved that he has purchased the land bearing S.No.514 from the Government and it belongs to him. The defendant has put up four windows on the ground floor and four windows on the first floor on the western wall of his property abutting the gully land and thereby he has tried to create a right of easement though in fact he has no right to enjoy light or air through the said wall and, therefore, the defendant is not entitled to put up any door or window abutting the said gully and also is not entitled to make use of the said gully land. It is also proved that the defendant has not enjoyed light or air through the windows on the western wall of his property for a period of 20 years so as to acquire right of easement by prescription. In the facts and circumstances of the case, in my view, no error of law or fact has been committed by the lower appellate court in

affirming the judgment and decree passed by the trial court whereby the suit filed by the plaintiff came to be decreed.

10. It may be appreciated that concurrent finding of fact recorded by both the courts below cannot be assailed in Second Appeal while exercising powers under Section 100 of the Civil Procedure Code. In the instant case, when the lower appellate court has rightly and correctly interpreted the document - Sanad Ex.57, coupled with other supporting documents issued by the Government showing that the land bearing S.No.514 admeasuring 199 sq.yds., has been conveyed to the plaintiff by the Government and as per the measurement shown therein the gully land is a part and parcel of the property bearing S.No.514 belonging to the plaintiff, I find no reason to interfere with the concurrent finding of fact recorded by both the courts below.

11. I am fortified in my above view by the judgment of the Apex Court in the case of Karnataka Board of Wakf v. Anjuman-E-Ismail Madris-Un-Niswan, (1999) 6 SCC 343, wherein the Supreme Court has observed that concurrent findings of fact cannot be assailed in Second Appeal. In the case of Panchgopal Barua & ors. v. Umesh Chandra Goswami & ors., JT 1997 (2) SC 554, the Apex Court has held that substantial question of law is sine-qua-non for exercise of jurisdiction under Section 100 of the Code. It was further held that generally speaking, an appellant is not to be allowed to set up a new case in Second Appeal or raise a new issue (otherwise than a jurisdictional one), not supported by the pleadings or evidence on the record and unless the appeal involves a substantial question of law, a Second Appeal shall not lie to the High Court under the amended provisions.

12. Seen in the above context, the substantial questions of law on which the present appeal was admitted for hearing are answered in the negative and against the appellant/defendant.

13. For the foregoing reasons, there is no merit in this Second Appeal which is liable to be dismissed and accordingly it is dismissed leaving the parties to bear their own costs. The judgment and decree passed by the lower appellate court confirming the judgment and decree passed by the trial court is confirmed and maintained.

